

Fee In Lieu of Compensatory Wetland Mitigation: A New Tool for Developers and Towns Alike

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Where a land use regulator requires a developer to perform compensatory wetland mitigation but where such mitigation is not practicable, a new law authorizes developers in certain circumstances to pay a fee to the State of New Hampshire in lieu of performing the mitigation. The new in lieu fee program offers something for everyone: a chance for municipalities to accomplish high priority local conservation goals; a mechanism for developers to proceed with projects once not viable because no compensatory wetland mitigation was practicable; and an opportunity for the State to accomplish projects with greater conservation value than can be achieved through conventional compensatory wetland mitigation.

History of In Lieu Fee Mitigation

NH has now joined at least nine other states which have authorized in lieu fee wetlands mitigation programs, including, Maine, Florida, New Jersey, North Carolina, Louisiana, Maryland, Oregon, Pennsylvania, and Virginia.

The New Hampshire Department of Environmental Services (DES) started the process in September of 2004 when it obtained a grant from Region 1 of the Environmental Protection Agency (EPA) to establish an in lieu fee wetland mitigation program. In January of 2005, Wetlands Bureau Administrator, Collis Adams, introduced the new in lieu fee program to the Wetlands Bureau Council. During the 2006 legislative session, the General Court enacted Senate Bill 140, known as Aquatic Resource Compensatory Mitigation. Chapter 313, Laws of 2006 has now been codified at RSA 482-A:28 through RSA 482-A:33. The law became effective on August 18, 2006.

DES adopted interim rules, which became effective November 21, 2006, to implement the new program. Full text of the interim rules is available at <http://www.des.state.nh.us/RuleMaking/#awetlands>. DES is currently preparing proposed final rules to implement the in lieu fee program and anticipates the final rules being adopted sometime in 2007.

New Hampshire Compensatory Wetland Mitigation Primer

New Hampshire RSA 482-A:3 requires a wetland permit for any proposed project that involves dredging or filling of a wetland. Before DES will issue a wetland permit, applicants must show that the proposed project will avoid adverse impacts to wetlands and will minimize and mitigate those wetland impacts which are unavoidable. Such mitigation is referred to as compensatory wetland mitigation. DES may require compensatory mitigation off-site if on-site mitigation is insufficient.

Conservation Commissions

Municipal conservation commissions have the opportunity to comment on applications for wetland permits. In practice, local conservation commissions usually cooperate with developers in the process of identifying and selecting property to conserve for off-site compensatory wetland mitigation. Indeed, the more conservation commissions enable developers to achieve compensatory wetland mitigation, the more likely it will be that developers will achieve such mitigation and that DES will issue wetland permits. Consequently, savvy conservation commissions develop detailed plans targeting parcels for land conservation. Such plans increase the likelihood that municipalities will capture funds from developers to conserve targeted parcels as part of developers' compensatory wetland mitigation.

Changes to Compensatory Wetland Mitigation Regulation with the In Lieu Fee Program

The in lieu fee program is not a substitute for the requirement to avoid or minimize impacts to wetlands. Where DES requires off-site compensatory wetland mitigation, the applicant must still evaluate available opportunities for upland buffer preservation and wetland restoration and creation.

However, the in lieu fee program can change the outcome when an applicant for a wetland permit is unable to achieve off-site compensatory wetland mitigation. Before the in lieu fee program, where DES required such mitigation but the applicant was unable to achieve it, DES would not grant the wetland permit. Because not obtaining a wetland permit could mean the end of a proposed project, developers sometimes paid substantial sums to achieve the requisite mitigation. No law limited the cost an applicant could be required to incur for off-site mitigation.

Under the in lieu fee program, developers have a new option, so long as the proposed wetland impact is less than one acre. When an applicant can show to DES that off-site compensatory wetland mitigation is impracticable, the applicant may pay a fee in lieu of performing compensatory wetland mitigation. So long as the applicant satisfies certain other criteria, DES may grant the wetland permit upon payment of the in lieu fee.

What About Conserving Wetlands?

Prior to the in lieu fee program, developers were the only entities performing compensatory wetland mitigation. The in lieu fee program adds the State of New Hampshire as an entity which performs compensatory wetland mitigation. Interim rule Part Env-Wt 807 describes the compensatory wetland mitigation that the State of New Hampshire will perform. Essentially, the State will pool the in lieu fees it collects into the Aquatic Resource Mitigation (ARM) Fund and use the fund to perform high value conservation. New interim rule 803.03 prioritizes which conservation projects the State should fund by establishing a preference for projects within the same watershed as the

wetland impact that generated the in lieu fee. Overall, the ARM Fund presents a significant opportunity to achieve large-scale conservation goals.

How Much Will the In Lieu Fee Be?

RSA 482-A:30 describes how DES will calculate the amount of the In Lieu Fee. In summary, DES will add the following three values:

- 1) The cost that would have been incurred if a wetland of the same type were constructed at the ratios listed in Table 800-1, based on a price of \$65,000 per acre of wetland created;
- 2) The acres of wetlands impacted, calculated pursuant to Env-Wt 803.04(C)(1), multiplied by the cost of land where the impact is occurring; and
- 3) An administrative cost equaling 5% of the sum of 1 and 2 above.

The interim rules do not change the Table 800-1, Minimum Compensatory Mitigation Ratios, nor are the final rules expected to change it.

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